United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2425

ORIGINAL

To be argued by
Lester E. Fetell.

United States Court of Appeals

For the Second Circuit.

SALVATORE A. GALIMI,
Plaintiff,

against

JETCO, INC.,
Defendant-Appellant,

and

RICHARD MOORE,
Defendant,

and

JETCO, INC.,
Third-Party Plaintiff-Appellant,

against

JAMES HODGES,
Third-Party Defendant,

and

UNITED STATES OF AMERICA,
Third-Party Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK.

Brief for Defendant-Appellant and Third-Party Plaintiff-Appellant Jetco, Inc.

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Statement.

This is an appeal from an order of the Eastern District Court (Orin Judd, USDJ) summarily dismissing the third-party complaint of Jetco, for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted (FRCP 12 [b] [1] and 12 [b] [6]) (A46). The dismissal was absolute with respect to the third-party claim for contribution, and conditional as to the claim for indemnity (A46).[1]

At first reading this case appears to be governed by this court's recent affirmance in *Sheridan v. DiGigiorgio* (10/9/74) (74-1728). Upon analysis, it will be demonstrated that the fact pattern is sufficiently different to permit a different approach and result. In addition, this appeal will present for appellate review legal matters not presented in *Sheridan*.

The legal issues raised in both *Sheridan* and the case at bar have wide and important application. The effect upon the Federal Tort Claims Act and *Dole v. Dow Chemical Co.*, 30 N. Y. 2d 143 (N. Y. Court of Appeals 1973), are far reaching. Under the doctrine of *Erie v. Tompkins*, *Dole v. Dow* procedures and rights would appear to be applicable to tort actions in which the Federal government is a party. This conclusion is obvious by virtue of the unlimited mandate of the Federal Tort Claims Act, whereby the Federal government:

> "* * * should be liable for the negligence of government employees, if a private person would be liable under the same circumstances." Wright, Federal Courts, Section 22, page 61.

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[1]The court granted Jetco leave to amend the third-party complaint "so as to state a contractual indemnity claim for $10,000 or less, if plaintiff *(sic)* so determines" (A46).

Sheridan and the case at bar (insofar as it follows the holding of *Sheridan*) have engrafted a *judicial* limitation upon the FTCA and *Dole v. Dow* in that the Federal government may not be sued as a third-party defendant, or *Dole v. Dow* "contributor," where, *by chance alone*, the prime plaintiff has received any benefits, or is entitled to receive benefits, under the Federal Employees Compensation Act, 5 U. S. C. 8116 (c) (FECA).

The legal issues presented here have been the subject of conflicting views in various Federal Circuits. In the geographical setting of the Second Circuit, *Dole v. Dow* has made this legal problem one of current vitality. *Dole v. Dow* is a mosaic-in-formation. In the ambit of FTCA these issues have national ramifications.

The Issues.

The court below (A39) held that in a personal injury action commenced by a federal employee, injured in the course of his employment, and who receives compensation benefits under FECA, the defendant is statutorily barred from maintaining a third-party action against the USA, notwithstanding the fact that the USA is a joint tortfeasor.

The rationale for this holding is that the USA may not be subject to paying both a compensation claim *and* a tort claim for the same injury to its employee, by virtue of an alleged exclusive remedy provision of the FECA (5 U. S. C. 8116 [c]).

In essence, third-party plaintiff Jetco, at bar, urges that this result deprives it of statutory and constitutional rights. The constitutional issue has not been raised in other suits, and was erroneously rejected out-of-hand by the District Court (A45).

The Facts.

One James Hodges, a named third-party defendant, was the owner of a flat bed truck which he leased to third-party plaintiff Jetco, Inc. Jetco was retained by the U. S. A. to haul buoys from Governor's Island. Jetco's driver was co-defendant Richard Moore .

Moore drove the truck to the Coast Guard base at Governor's Island, and went about his business, awaiting the loading of the truck by Coast Guard personnel. In the course of this loading, by *plaintiff*, and others, a stow of buoys fell, and plaintiff asserts that he was injured.

Plaintiff Galimi commenced an action in the U. S. District Court, Eastern District of New York, by virtue of alleged diversity jurisdiction. He named as defendants Jetco and its driver Moore.

Jetco, in turn, commenced a third-party action against the truck owner Hodges and the U. S. A. (A5). This action was consistent with the pre-*Dole* active-versus-passive tort-feasor concept and the present *Dole* concept of contribution between joint tort-feasors.

The United States Attorney, on behalf of the government, moved, in lieu of an answer, for an order dismissing the third-party complaint against the U. S. A. pursuant to FRCP 12(b)(1) and 12(b)(6) (A10).

The motion was briefed and argued before Hon. Orin Judd, USDJ, on May 24, 1974, prior to the Second Circuit's decision in *Sheridan*. The motion was decided after the *Sheridan* decision came down.

The government conceded that it could be sued as a third-party defendant, but only where the claim was pre-

dicated upon contractual indemnity; it denied the right to sue it on a theory of contribution (A13). Insofar as any contractual rights which Jetco will be able to establish, it was urged that, to the extent that the claim was in excess of $10,000, the suit would have to be brought in the Federal Court of Claims pursuant to the Tucker Act.

THE LAW.

POINT I.

The Federal Employees Compensation Act is a limited remedy statute only insofar as the injured federal employee is concerned. It was not written to delimit the rights of third parties.

The government's claim of immunity from third-party suits for contribution (and we are dealing only with the contribution problem in this case) is predicated upon the language of 5 U. S. C. 8116 (63 Stat. 854, 861):

> "The liability of the United States under this Act with respect to the injury of any employee shall be exclusive and in place of all other liability to *the employee*, his legal representative, spouse, dependents, next of kin, *and anyone otherwise entitled* to recover damages from the United States *on account* of such *injury* in any direct judicial proceedings in a civil action or by proceedings under any Federal tort liability statute." (Italics added.)

It is the government's contention that a third-party plaintiff, such as Jetco, is the "anyone other wise entitled to recover from the United States on *account* of * * * plaintiff's injury." It is Jetco's contention that such was not the Congressional intent of these words.

Out of the apparent ambiguity of the FECA arises the dispute at bar. This problem was anticipated and touched upon by Mr. Justice Burton in *Ryan v. Pan Atlantic S. S. Corp.*, 350 U. S. 124 (1956). We say "touched upon" because Justice Burton never carried his preliminary discussion to a conclusion, opting instead to find an independent basis for resolving the issues in *Ryan*. In *Ryan* the court was dealing with the Longshoremans and Harbor Workers Compensation Act, 44 Stat. 1424 *et seq.*, which contained the same language as FECA in its exclusivity provisions. In interpreting that section, Justice Burton wrote:

> "The obvious purpose of this provision is to make the statutory liability of an employer to contribute to its employee's compensation the exclusive liability of *such employer to its employee, or to anyone* claiming under or through such employee, *on account of his injury or death arising out of that employment.* In return, the employee, and those claiming under or through him, are given a substantial *quid pro quo* in the form of an assured compensation, regardless of fault, as substitute for their excluded claims. On the other hand, the Act prescribes no *quid pro quo* for a shipowner that is compelled to pay a judgment against it for the full amount of a longshoreman's damages." (Italics in original decision.)

The same argument was made at bar in the District Court. Mr. Justice Burton went on to say in *Ryan* that "It is not an action by or *on behalf* of *the employee* * * *." (Italics added.) Thus, proper reading of the so-called exclusivity clause indicates that the "anyone claiming" group refers to that line of individuals delineated as "legal representatives, husband, wife, defendants, next of kin," i. e., one who stands in the shoes of the injured compensation recipient. Clearly this does not include one brought into the lawsuit by reason of a claim of tort liability.

Mr. Justice Burton did not abandon the question of the defining the "anyone claiming" group, reserving the issue for later determination in such cases as the issue might subsequently arise:

> "We do not reach the issue of the exclusionary effect of the Compensation Act upon a right of action of a shipowner under comparable circumstance *without reliance upon an indemnity or service agreement of a stevedoring contractor*" (footnote 6). (Italics added.)

The issue was clearly drawn in *Ryan;* where there is an independent, contractual predicate for third-party liability, the so-called exclusivity clause of the compensation statute cannot act as a bar to third-party rights. Such independent right was found to exist, and the Supreme Court rested on that predicate, reserving for subsequent determination the remaining issue.

The case at bar presents for resolution the issue left unresolved in the cited footnote in *Ryan.*

Judge Craven, of the 4th Circuit picked up where Mr. Justice Burton left off: *Wallenius Bremen G. m. b. H. v. U. S. A.*, 409 Fed. 2d 994 (4th Cir. 1969). In that case the compensation statute at issue was FECA. The court asked the following question:

> "Whether the exclusive remedy provisions of FECA bars the claim of a third party for indemnity against the federal government for damages paid an injured government employee." 409 Fed. 2d 994, 995.

The court responded in the *negative,* and reversed summary judgment in favor of the United States.

Judge Craven's analysis of the "anyone claiming" group is consistent with the discussion of the Supreme Court in *Ryan*, and with the argument made by appellant at bar:

> "The listing of those excluded from other remedies is the employee, his legal representative, spouse, dependents, next of kin, and *finally, the catch all category 'anyone otherwise entitled,' which, we think, relates back to previous nouns.* All are connected to or closely related to the government employee. The catchall category simply expresses congressional caution, typical in drafting of statutes, to exclude all deriving their claims from a *personal relationship* to the government employee. *Ejusdem generis* would for example, perhaps exclude from any other remedy an adopted child, neither next of kin nor dependent, *but would not exclude a stranger.*" (Italics added.)

In order to sustain the position of the Government at bar, it becomes necessary to determine whether congress actually meant to bar third parties from actions—over against the government, or whether congress was merely attempting to assure that a family member did not become entitled to payments under the guise of a semantic distinction.

In an attempt to clarify congressional intent, appellant at bar submitted for consideration a recent analogy which we urge is dispositive, but which the court below ignored in its decision: Congress recently amended the Longshoremans and Harbor Workers Compensation Act, 33 U. S. C. 905, which, *inter alia*, bars indemnity suits between shipowner and third-party defendant stevedores, in the common triangle of longshoreman v. ship v. stevedore. This bar was set forth in 33 U. S. C. *905b*, notwithstanding the fact that 33 U. S. C. *905a* contains the same exclusive remedy language as appears in FECA "* * * anyone otherwise

entitled to recover damages * * * on account of such injury or death." If, as a matter of statutory interpretation, this language was effective as an exclusive remedy bar, why was it necessary for congress to enact Section *905b* to accomplish the same end? The answer appears clear that congress did not consider such language to be a bar, and that the interpretation of Mr. Justice Burton and Judge Craven truly expressed congressional intent.

The question of congressional intent is the very essence of the appeal at bar, and bears restatement: *Was it the intent of congress, in the drafting of the compensation statutes, to limit the employer's exposure to the amount of compensation payments made to the injured employee, as a substitute for not only the employee's third-party tort rights, but also as a substitute for the third-party contribution rights of the party sued by the injured employee?*

With respect to the FECA, the question arises as to whether congress truly intended to amend or modify the Federal Tort Claims Act, insofar as third-party suits was concerned. This court was presented with that argument in *Sheridan*, in the government's brief in the following formulation (at p. 7 thereof):

> "The question is, therefore, whether the exclusivity section of the Federal Employees Compensation Act revokes the consent of the Government in the *Federal Tort Claims Act* to be sued as a third party defendant."

The Sheridan brief then proceeds to make a line by line analysis of the FECA, as amended by the Senate. It would appear that the words "any person" were amended to read "the United States." This change is *de minimis*. It merely inverts the language from a

semantic formulation setting forth the *rights* of others to *the obligations* of the United States, without disturbing the substantive portions of the act. This interpretation is borne out by the fact that the limitation of liability of the United States is only with respect to claims asserted by employees, or on their behalf, by their "legal representatives," etc. The Senate amendment contains the ever-ambiguous words "anyone otherwise entitled to recover." The government persists in its interpretation of these words to describe a class not in the family of the injured employee. Mr. Justice Burton rejected that definition in *Ryan*, as long ago as 1956; the Fourth Circuit rejected the definition as recently as 1969.

Judge Judd cites the *Newport Air Park* case, 419 F. 2d at 347 (A44), which purports to assuage the "unfairness" to innocent third parties, deprived of their third-party rights, by pointing out that this is in "exchange for" no fault benefits *to "covered employees."* This is a total *non sequitur*, and the illogicality of the argument was pointed out by Mr. Justice Burton, in *Ryan*, *supra:*

> "In return the, the *employee, and those claiming under him* are given a substantial *quid pro quo* in the form of an assured compensation, regardless of fault, as a substitute for *their* excluded claims. On the other hand, *the Act prescribes no quid pro quo for a shipowner that is compelled to pay a judgment obtained against it for the full amount of a longeshoreman's damages.*" (Italics added.)

To make the innocent third-party plaintiff an insurer of the government employee's claim for benefits, beyond those paid in compensation, is not only "unfair," but violates the equal protection provisions of the Federal Constitution. Under what rule of law can the federal government compel an innocent passive tort-feasor to

underwrite the government's obligations to respond in damages to another for the active torts of the government? It may be that the government, as well as a private firm, may, as a condition for entering into a contract for services, require that the contractor provide a policy of liability insurance to the government, to underwrite any lawsuit arising out of the particular transaction. *Kelly v. Caristo Construction Corp.*, 38 A. D. 2d 725. Such procedure is by way of *contractual* indemnity, regardless of fault, but does not abrogate, or vitiate any other rule of law permitting contribution. The government does not urge, here, that Jetco contracted away its right to contribution, it urges that Congress has removed that right.

One does not cavil with the proposition that the sovereign giveth, and the sovereign (may) taketh away. This power, however, under our constitutional form of government, must be even-handedly administered. It does not stretch analogy to urge that this smacks of civil Bill of Attainder. Selectivity of the type suggested here by the government violates every rule of due process. Can it be urged that the Supreme Court would condone further emasculation of the Federal Tort Claims Act to exclude accidents between taxicabs and government vehicles, etc.? If the government is desirous of making waiver of third-party rights a condition to doing business with the government, this must be done by clear congressional enactment or by contract.

Had congress clearly intended to amend the Federal Tort Claims Act, it would have done so by direct amendment of *that statute* rather than by the indirect device of amending another statute (FECA). To judicially deprive a large class of citizens of their rights against the government, the deprivation should, and must, be accomplished in clear and unambiguous terms, by the

Congress, and not the courts via judicial interpretation. Our courts have time and time again refused to judicially enact rules of such scope, preferring to defer to congress.

It is apparent that we are here dealing with semantics, which has been read differently by different courts and judges, even by the U. S. Supreme Court in *Ryan, supra.*

The court below rejected the constitutional argument solely by virtue of the fact that counsel in the *United Airlines* case, 335 Fed. 2d 402-404, did not raise the issue in that case (A45). This is a fine reed, indeed, upon which to reject a constitutional argument that was made in good faith. Judge Judd held that "The difference between the liability of a private person and the liability of government is fundamental and long established." It is respectfully urged that this simply begs the question. The difference *existed* prior to the Federal Tort Claims Act. The Act itself (28 U.S.C. 2674) removed such distinction:

> "The United States shall be liable * * * in the same manner and to the same extent as a *private individual* under like circumstances * * *" (A41).

Appellant, at bar, relies on Congress' removal of the difference between the liability of the two; Judge Judd has reimposed the difference, in deference to the argument of the government, which here seeks to restore the difference.

In the Sheridan brief (at p. 10) the government refers to testimony by government officials who testified to the government's budgetary problems, and its desire to "create savings to the United States both in damages recovered and in the expense of handling lawsuits." If this be the case, it would be accomplished by passing on these

underwriting costs to an undefined class, who would learn, to *their* expense, and sorrow, that they would be called upon to create savings to the government, in the fortuitous event that they were sued by one collecting federal compensation, under FECA.

Judge Judd distinguishes the holding in *Weyerhauser Steamship Co. v. United States*, 372 U. S. 597 (A44). Following *Ryan*, *Weyerhauser* was another instance of the interpretation of the "anyone otherwise entitled" language coming before the Supreme Court. As in *Ryan*, the court did not resolve the issues in the case by a definitive resolution of the problem, but rather relied upon an alternative ground for resolution. What is important to note in *Weyerhauser* is the fact that the court once again refused to accept the simplistic definition of the "anyone otherwise" phrase. As Mr. Justice Stewart pointed out:

> "But the general language upon which the Government reliefs follows explicit enumeration of specific categories; employees, their representatives, and their dependents. Under the traditional rule of statutory construction which counsels against giving to general words a meaning totally unrelated to the more specific terms of a statute, *we think the meaning of the statutory language is far from 'plain.'*" (Italics added.)
>
> * * *
>
> *"There is no evidence that Congress was concerned with the rights of unrelated third parties* * * *." (Italics added.)

There is no disputing the fact that Congress had the authority to overrule "settled doctrines of admiralty Law," if it be so disposed. Mr. Justice Stewart, as did Mr. Justice Burton and Judge Craven, were quite properly

convinced that Congress had no intention of overruling any settled doctrines (let alone amending the Federal Tort Claims Act). In *Weyerhauser*, the Supreme Court did not hold that the ancient admiralty doctrine could not be overruled by Congress; it held that Congress had no intention of doing so. Mr. Justice Stewart supports the argument of appellant at bar, that Congress was "not concerned," i. e., did not address itself to the sweeping amendments which the government belatedly ascribes to it.

Weyerhauser stands for more than the simple proposition that the rule of divided damages is unaffected by the compensation statute; it also supports the proposition that the Supreme Court has twice refused to interpret the "anyone otherwise" language in the manner here urged.

Treadwell v. United States, 372 U. S. 722, is also mentioned in the government's brief in *Sheridan* (p. 16). The government avoids the issue by arguing that on remand from the Supreme Court ("for further consideration in light of *Weyerhauser*") the District Court in Pennsylvania allowed contribution "on the *possibility* that the United States owed Treadwell an independent duty." Here, again, the government is resorting to speculation in order to support a very significant deprivation of rights.

Judge Judd held that this circuit has by "similar implication" resolved the issues here presented in *Schwartz v. C.G.T.*, 405 F. 2d 270 (1968) (A42). That is not so. In *Schwartz*, this court held that:

> "* * * the parties stipulated that the third party complaint seeks recovery 'solely upon an implied contract of workmanlike performance arising out of the status existing' between them * * *"

The affirmance was predicated upon an agreement with the District Court that the action was one in tort and therefore "there was no contractual relationship between (shipowner) and the United States." The issues in *Schwartz* are totally inapposite to those raised at bar. There was no discussion in this court's decision in *Schwartz* of the exclusivity feature of the compensation statute.

There is no reported decision in the Second Circuit squarely addressing itself to the legally significant issues here presented. *Sheridan* was an affirmance from the bench, without a written opinion. Appellant at bar respectfully urges this honorable court to readdress itself to these issues, *Sheridan* notwithstanding, in order to either reverse itself, upon reconsideration, or to lay a basis for a petition for certiorari to the United States Supreme Court. It would appear that the issues presented here are sufficiently clear-cut to justify a definitive determination, which the Supreme Court reserved in both *Ryan* and *Weyerhauser*.

Appellant, in the opening statement, *supra*, has alluded to the importance of a definitive ruling on the rights of third parties against the government, particularly in the light of the *Dole v. Dow* problems. A subsidiary effect of this determination will be the opportunity of insurers to reassess their exposure in such cases vis-à-vis rate structures and underwriting decisions.

Conclusion.

The dismissal below should be reversed and the third-party complaint reinstated with respect to the claim for contribution, as a matter of law.

Respectfully submitted,

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the within is

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of December, 1974

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